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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1058.

MIDLAND COOPERATIVE WHOLESALE,
PETITIONER,

VS.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, BITUMINOUS COAL DIVISION OF THE DEPARTMENT OF INTERIOR, AND H. A. GRAY, DIRECTOR THEREOF,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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On pages 10-11 of Brief for Respondents in Opposition the following statement appears, which characterizes the essential error of the court below and the Bituminous Coal Division:

> "Petitioner claims that the paragraph does not constitute an 'exception' or 'exemption' for farmers' cooperatives, but that it is 'merely an interpreting or clarifying provision for the purpose of preventing

misunderstanding' (Pet. pp. 22-23); *it is contended that, entirely apart from paragraph* 13, *cooperatives, whether for farmers or consumers,* are not subject to paragraph 12 of Section 4 II (i). This forced interpretation would make paragraph 13 unnecessary, and is hardly consistent with the restriction of the paragraph to farmers' cooperatives alone. If Congress intended that consumer or other cooperatives be given the same advantages as agricultural cooperatives it would undoubtedly have said so." (Emphasis supplied).

Petitioner has never contended that "cooperatives, whether for farmers or consumers, are not subject to paragraph 12 of Section 4 II (i)." It is unfortunate that respondents and the court below have repeatedly committed the aforesaid error concerning the fundamental question in issue.

On page 17 of its brief filed in the Supreme Court in support of its petition for writ of certiorari petitioner says this:

> "Petitioner emphasizes that it has not contended during this proceeding or at any other time that it is 'exempt' from the unfair trade practices enumerated in paragraph 12 of Section 4 II (i). Petitioner concedes that it, on equality with all others, including farmers' cooperative associations, should be and is legally obligated not to commit any of the unfair trade practices which are within the spirit and meaning of those enumerated in paragraph 12 of Section 4 II (i). If petitioner should be authorized to handle coal as a 'distributor' or as an 'intervening agency,' without the arbitrary and unreasonable restrictions included in the order, it concedes that it would not only be amenable to regulation with reference to the prohibitions included in paragraph 12 of Section 4 II (i), but it would also be amenable to all other provisions of the Act and the regulations of the Bituminous Coal Division on the same or equal terms as all other persons and registrants.
>
> "Petitioner's primary contention is that patronage savings, because of the inherent nature thereof,

> are not within the meaning or intent of the prohibitions specified in paragraph 12 of Section 4 II (i), or of any other provisions of the coal Act pertaining to unlawful practices. * * *"

Petitioner's Questions for Decision, Reasons Relied on for the Allowances of the Writ and its Argument clearly state petitioner's view as herein emphasized.

Nevertheless, based upon the aforesaid misconception of the fundamental legal questions raised by petitioner, the respondents have included in their Brief in Opposition, again, the misstatement that petitioner contends that

> "* * * cooperatives, whether for farmers or consumers, are not subject to paragraph 12 of Section 4 II (i)."

Therefore, the only reason for filing this reply brief is to take due precaution that the erroneous conception of respondents of the fundamental questions involved for review shall not be inadvertently followed by the Supreme Court. Inasmuch as respondents and the court below have so consistently taken the erroneous view as herein stated, petitioner is gravely concerned that it may not have made itself sufficiently clear pertaining to the fundamental legal questions involved, even in its petition for writ of certiorari. Petitioner desires that the erroneous conception of the respondents and the court below shall not be followed by the Supreme Court, due to a lack of clarity in petitioner's petition and brief.

Moreover, in stating that its "patronage savings" are legally different by nature from "a discount, dividend, allowance, rebate, or a price other than that determined in the manner prescribed by this Act," petitioner is not thereby providing an escape or "loop-hole" for itself from the provisions of paragraph 12 of Section 4 II (i). If the Supreme Court should adopt petitioner's view and decide that "patronage savings" (which are controlled by state

law, petitioner's charter and by-laws and by definite cooperative principles) are not the same thing as those things named in paragraph 12 of Section 4 II (i), petitioner would still be subject to all of the prohibitions named in paragraph 12 of Section 4 II (i). It could not engage in the practice of granting "discounts," "dividends," "rebates" or "allowances." It could not legally sell coal to its retail member associations at "a price other than that determined in the manner prescribed by this Act," *i. e.*, at a price below the minimum price fixed by the Division. It is a strained construction to say that the distribution of "patronage savings" resulting from cooperative marketing of coal gives to the retail cooperative associations and thence to the consumers of the coal a "price" (many months or even years later), "other than that (price) determined in the manner prescribed by this Act."

On account of its misconception of the fundamental questions involved, which misconception has been supported by the court below, respondent has urged that the consideration given by the legislative committee to include consumers' cooperative associations within the terms of the explanatory provision of paragraph 13 of Section 4 II (i) constitutes proof that the Congress intended not only to "exempt" or "except" so-called "*bona fide* and legitimate farmers' cooperative organizations" from the prohibitions of paragraph 12 of Section 4 II (i) but intended to include consumers' cooperative associations therein.

If given an opportunity to do so, petitioner will satisfy the Court that the respondent, and the court below, have an erroneous conception of the meaning and purpose of paragraph 13 of Section 4 II (i). That paragraph can not be correctly construed as exempting farmers' cooperative associations from engaging in the conventional type of rebating, discounting, or making of price allowances which the Congress intended to

eliminate. Such contention of respondent, and holding of the court below, is repugnant to the principle of numerous cases wherein the Supreme Court and other Federal courts have held that cooperative associations are amenable to the Sherman Act, the Robinson-Patman Act and similar Federal acts intended to include all alike within (and to exclude or exempt none from) the sweep of the corrective powers therein expressed.

If such misconception of respondent, and the court below, may be more thoroughly revealed on the merits, it will become clear that paragraph 13 of Section 4 II (i) is, indeed, merely an interpretative or explanatory provision to prevent misunderstanding. It will also be revealed that the great breadth and depth of the tide manifesting itself within the intent of the Congress for a corrective remedy to the evils besetting the bituminous coal industry were not stultified by outright exemption of farmers' cooperative associations therefrom. Thereupon, it will appear that it is of no importance, as a matter of law, that consumers cooperative associations were not included within the explanatory provision of paragraph 13 of Section 4 II (i).

Regardless of how the Supreme Court may decide the questions involved, it is urged that the questions shall not be left in the unclear condition as stated in the opinion of the court below and as re-emphasized in the present Brief in Opposition.

In Conclusion, petitioner requests the Supreme Court to grant certiorari in order that the opinion of the court below may be reviewed and the questions for decision clearly decided.

Respectfully submitted,

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